SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1584

In the Matter of:

ANNE H. HAMPTON, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF FREDERICK JORDAN HAMPTON, DECEASED,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF CLAIMS

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TO THE UNITED STATES COURT OF CLAIMS

The Petitioner, Anne H. Hampton, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of The United States Court of Claims entered in this proceeding on March 19, 1975. References are to the Appendix included as a part of this Petition.

OPINION BELOW

The opinion of The United States Court of Claims, Docket No. 126-73, decided March 19, 1975, appears as the Appendix hereto.

JURISDICTION

The judgment of The United States Court of Claims was entered on March 19, 1975. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1255(1).

QUESTION PRESENTED

What is the statute of limitations with respect to the special tax relief provided by Section 692 of the Internal Revenue Code of 1954 to servicemen killed in a combat zone?

STATUTORY PROVISION INVOLVED

Section 692 of the Internal Revenue Code of 1954, 26 U.S.C. Section 692, as follows:

SEC. 692. INCOME TAXES ON MEMBERS OF ARMED FORCES ON DEATH.

> In the case of any individual who dies during an induction period (as defined in section 112(c)(5)) while in active service as a member of the Armed Forces of the United States, if such death occurred while serving in a combat zone (as determined under section 112) or as a result of wounds, disease, or injury incurred while so serving—
>
> > (1) any tax imposed by this subtitle shall not apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year ending on or after the first day he so served in a combat zone after June 24, 1950; and

> (2) any tax under this subtitle and under the corresponding provisions of prior revenue laws for taxable years preceding those specified in paragraph (1) which is unpaid at the date of his death (including interest, additions to the tax, and additional amounts) shall not be assessed, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment.

The foregoing appears as it read during all times here pertinent and does not include a new provision relating to servicemen missing in action, added in 1974 by Public Law No. 93-597, Section 4 (January 2, 1975).

STATEMENT OF THE CASE

The facts involved herein were stipulated and are not in dispute.

The Petitioner is the widow of Colonel Frederick Jordan Hampton, Deceased, and the duly qualified and acting executrix of his estate. Colonel Hampton was a career Air Force officer who died serving his country in the Vietnam War, after prior combat service in Korea.

From April 1953 to October 1953, Colonel Hampton was assigned to active military duty in Korea with the 370th Bombardment Squadron, 307th Bombardment Wing (M), Kadena Air Force Base, APO 239. During this period of service, the Armed Forces of the United States were actively engaged in combat in Korea and the area was designated as a combat zone pursuant to Executive Order 10195. Colonel Hampton spent the years from October 1953 to November 1967 in various other military assignments.

On November 3, 1967, he was again assigned to active combat with the 311th Air Command Squadron in the Republic of Vietnam which had been classified as a combat zone on January 1, 1964 pursuant to Executive Order 11216, dated April 26, 1965.

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On or about March 6, 1968, Colonel Hampton was killed in action in Quang Tri Province, Republic of Vietnam.

The Petitioner and Colonel Hampton filed joint federal income tax returns for the calendar years ended December 31, 1963 and 1964, on April 15, 1964 and April 15, 1965, respectively, reporting federal income tax liabilities of $2,468.17 and $2,928.00, respectively. The entire amounts of these liabilities were timely paid by Colonel Hampton.

On January 2, 1970, the Petitioner filed Claims for Refund with the Internal Revenue Service with respect to the entire amount of the federal income taxes paid by Colonel Hampton for the calendar years ended December 31, 1963 and 1964 in the amounts of $2,468.17 and $2,928.00, respectively.

The aforementioned claims for refund were disallowed by the Internal Revenue Service on April 30, 1971 and June 29, 1971, respectively.

On April 16, 1973, the Petitioner filed a Petition in the United States Court of Claims for the recovery of federal income taxes paid by Colonel Hampton for the calendar ended December 31, 1963 and December 31, 1964. Pursuant to Petitioner's Motion for Summary Judgment, filed December 31, 1973, and Respondent's Cross-Motion for Summary Judgment, filed March 26, 1974, the United States Court of Claims, in a decision entered March 19, 1975, denied the Petitioner recovery with respect to her claims for refund and dismissed the Petition in these proceedings.

REASON FOR GRANTING WRIT

The United States Court of Claims has decided a question of major significance regarding the income tax liability of members of the United States Armed Forces who are killed in combat in service of their country. In particular, it has determined that the estate of a serviceman killed in action is not entitled to

a complete forgiveness of all income taxes paid by him from the year he first served in a combat zone, through and including the year of his death in action in Vietnam. This decision cannot be reconciled with the intent of the Congress to accord complete tax relief in such situations and fosters the denial of similar tax relief to families of other Vietnam servicemen who were killed in combat and who previously paid their income taxes in a timely fashion.

The resolution of the question presented turns entirely on a determination of what period of limitations governs the special tax relief provided by Section 692 to servicemen dying in combat.

The Court of Claims found that the traditional period of limitations provided by Section 6511(a) is controlling; that the running of the period commenced on the date of filing of the returns in question; and, that, even if the Petitioner were to prevail in her arguments to the contrary, her claims for refund must nonetheless be disallowed because paragraph (1) of Section 692 applies only to *"years of actual, continuous combat service."* (A. p. A-15).

To the contrary, the Petitioner submits that the Court of Claims erred because if the traditional period of limitations provided by Section 6511(a) does, indeed, control, it can only commence to run from the date of Colonel Hampton's combat death and the returns in question were, in fact, timely filed within this limitations period. Also, the Court of Claims erred because it failed to recognize that paragraph (1) of Section 692 clearly applies to the intervening non-combat service years of a serviceman who served in two combat zones.

In no uncertain terms, Section 692(1) of the Internal Revenue Code provides that in the case of any individual who dies in a combat zone "any tax imposed . . . shall not apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year ended on or after the first

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day he so served in a combat zone after June 24, 1950". In applying this statute to Colonel Hampton's 1963 and 1964 years, the Court of Claims determined that the three year statute of limitations provided by Section 6511(a) began to run from the filing dates for these years' returns, namely, April 15, 1964 and 1965, respectively.

This approach produces the anomalous, unjust and patently absurd result that the three year limitations period (plus appropriate extensions under Section 7508 of the Code) might expire prior to a serviceman's actual combat death, the one and only event which triggers the complete relief intended by Section 692(1). In other words, the clear thrust of the Court of Claims decision is to permit the statute of limitations to cut off a right of relief and eliminate a cause of action before it ever arises.

Indeed, with respect to Colonel Hampton's 1963 year, the Court of Claims determined that the limitations period for filing a claim for refund expired on April 15, 1967, almost a full year before his death, notwithstanding the statutory mandate that combat death is the sole event giving rise to relief under Section 692(1). Certainly, the Court of Claims did not mean to suggest that a serviceman, during non-combat years, should file claims for refund in anticipation of death in order to protect the special relief to which his estate would be entitled should he later be killed in a future combat zone. Had Colonel Hampton filed these anticipatory claims, there is no doubt that they would have been disallowed for the simple reason that he was alive on April 15, 1967. In short, these claims would have been totally ineffectual and inappropriate.

Obviously, Section 6511 assumes that the cause of action arises either upon the date of actual payment of tax or upon the due date for filing the returns. However, neither of these events triggers a cause of action or right to relief under Section 692(1). Congress purposefully appointed death as the singular event establishing the cause of action or right to relief under Section

692(1), and, to the extent this cause or right is not within the contemplation of Section 6511, injustice prevails if the limitations period is applied in the normal fashion.

All statutes of limitations are based on the interests of efficient judicial administration and require that the appropriate claims or causes of action be presented within a reasonable period of time after they arise. Without question, neither interest is served by requiring a claim to be asserted before the time it first arises.

In sum, it is the date of a serviceman's combat death, and not the date the returns in question were filed, which must control the running of the limitations period under Section 692(1). In the instant case, then, the refund claims for 1963 and 1964 were timely filed and not barred under Section 6511(a) because they did not first arise until Colonel Hampton's combat death and were properly filed within three years of his combat death.

Alternatively, Petitioner argues that Section 692(1) provides an absolute relief, uninhibited by the general statute of limitations provided by Section 6511(a). The recovery of taxes pursuant to Section 692(1) is not restricted to the mechanics of "refund as an overpayment" (A. pp. A-10—A-11, which is a prerequisite for the operation of Section 6511(a). The cause of action established by Section 692(1) is a cause of action in the nature of an account stated against the United States for the recovery of funds which Congress has expressly determined belong to the Petitioner. The statute applicable to such a claim is 29 U.S.C. Section 2401, which establishes a six (6) year period of limitations commencing upon the accrual of the cause of action. See *Hoon Kwan Young v. United States*, 110 F.Supp. 237 (D. Hawaii 1953). Because the instant proceeding was initiated within six years of Colonel Hampton's death, this suit was timely filed and should not have been dismissed by the Court of Claims.

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In fact, the Court of Claims admits that an anomalous result would obtain if Petitioner were correct in her contention that the death of Colonel Hampton gave rise to a claim for the refund of 1963 and 1964 taxes. (A. p. A-14). The Court of Claims avoided this conceded anomaly by holding that Section 692(1) was intended only to cover years of continuous combat service so that it did not apply to 1963 and 1964, non-combat years intervening between Colonel Hampton's combat zone service in Korea and Vietnam.

This is a wholly unwarranted and erroneous interpretation of the Congressional intent in enacting Section 692(1) and is not supported by the actual wording of the statute, the legislative history or the official interpretation of Section 692(1) by the Internal Revenue Service.

The statute clearly indicates that non-combat years intervening between service in two combat zones is covered. The only parameters are the first day a serviceman served in a combat zone after June 24, 1950 and the date of his death in a combat zone. There is no statutory or regulatory limit requiring continuous and actual service in one combat zone.

Furthermore, the complete and absolute relief of Section 692(1) is not limited in any fashion by its legislative history. If anything, the legislative history gives full support to Petitioner's position. Section 692(1), unlike its predecessors, is a completely open-ended statute. That is, it provides no cutoff date subsequent to June 24, 1950 for claiming the absolute and unlimited relief it intends. Moreover, it was never repealed during the relative peace which existed between the conflicts in Korea and Vietnam and, even after the Vietnam conflict was joined, the June 24, 1950 commencement date was never made current, by statute or by regulation, to reflect the designation of Vietnam as a combat zone as of January 1, 1964.

On the other hand, the Korean War and World War II predecessors of Section 692(1), Sections 154 and 421 of the 1939 Code, respectively, were close-ended in that the relief they afforded could only be claimed during certain statutory periods.[1] For example, Section 154, the Korean War relief statute, ultimately provided that claims for refund to obtain this special relief had to be filed no later than January 1, 1955.

The special and open-ended nature of Section 692(1) is plainly evident. Had Congress intended to limit Section 692(1) to service in one combat zone, it clearly could have indicated this intent by providing for a statutory cutoff date at the time of its enactment in the 1954 Code or by appropriately amending the statute subsequent to the designation of Vietnam as a combat zone.

Prior to the enactment of Section 692(1) as it presently reads, Congress historically provided new commencement and cutoff dates to abbreviate the tax relief provided in cases of combat deaths. The decision of Congress not to take similar action despite the years intervening between the Korean and Vietnam conflicts clearly indicates its intent to alter its historical pattern and to cover both of these combat zones and any intervening non-combat years.

Indeed, the Internal Revenue Service itself has recognized in Rev. Rul. 69-301, 1969-1 C.B. 183, that Section 692(1) does cover a dual combat zone fact pattern where non-combat years intervene between two wars. In pertinent part, that ruling provides:

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1. Section 154, Internal Revenue Code of 1939, as added by Section 334 of the Revenue Act of 1951, 65 Stat. 452, and amended by Section 104, Technical Changes Act of 1953, 67 Stat. 615; Treasury Regulations 118 (1939 Code), Section 39.154-1, as amended by T.D. 6106, 1954-2 C.B. 137; Section 421, Internal Revenue Code of 1939, as added by Section 8 of the Current Tax Payment Act of 1943, 57 Stat. 126, and amended by Section 1, Act of August 5, 1947, 61 Stat. 778; Treasury Regulations 111 (1939 Code), Section 29.421-1, as added by T.D. 5305, 1943 C.B. 260, and as amended by T.D. 5645, 1948-2 C.B. 14.

> * * * Since the decedent served in two combat zones, Korea and Vietnam, and died as a result of wounds received serving in the latter zone, it is held that he is not subject to any Federal income taxes for the taxable year in which falls the date of his death and for any prior taxable year ending on or after the first day he so served in a combat zone after June 24, 1950, pursuant to the provisions of section 692 of the Code. 1969-1 C.B. at 183.

Moreover, it must be strongly noted that the Respondent, on brief and in argument before the Court of Claims, has never advanced the proposition that Section 692(1) was inapplicable to non-combat years.

The inequity of the position of the Court of Claims is emphasized by its findings with respect to subparagraph (2) of Section 692. Specifically, it found that subparagraph (2) provides a forgiveness of all taxes *owed* by a serviceman, at the time of his death, whether or not they relate to taxable years during which he served in a combat zone (A. pp. A-16—A-17) [Emphasis Added]. Thus, if Colonel Hampton had not paid his 1963 and 1964 taxes, his liability would have been forgiven at the instant of his death. Surely, a serviceman who pays his taxes in a timely and orderly fashion and then is killed in combat is entitled to no less relief under Section 692 than a serviceman who fails to properly discharge his federal tax liability.

CONCLUSION

Unless promptly resolved by the Court, the decision below will sanctify and perpetuate an unjust decision affecting not only Colonel Hampton's family, but the families of other servicemen killed in Vietnam. For this reason, and because of the importance of the tax question involved, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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In The United States Court of Claims

No. 126-73

(Decided March 19, 1975)

ANNE H. HAMPTON, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF FREDERICK JORDAN HAMPTON, DECEASED v. THE UNITED STATES

Sherwin P. Simmons, attorney of record, for plaintiff, *Trenam, Simmons, Kemker, Scharf & Barkin*, of counsel.

Laurence J. Whalen, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Gilbert E. Andrews and Joseph Kovner*, of counsel.

Before Durfee, *Senior Judge*, Kashiwa and Kunzig, *Judges*.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Durfee, *Senior Judge*, delivered the opinion of the court:

In her individual capacity and as executrix of the estate of her deceased husband, plaintiff brings this action to recover federal income taxes paid for the calendar years ending December 31, 1963, and December 31, 1964. The issue we are called upon to decide is whether the statute of limitations generally applicable to tax refund claims applies to claims for refund filed pursuant to § 692 of the Internal Revenue Code of 1954. The case is before us on the parties' motions for summary judgment; the pertinent and controlling facts are not in dispute.

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Plaintiff is the widow of Colonel Frederick J. Hampton, a career officer in the United States Air Force. From April to October 1953, Colonel Hampton performed active military duty in Korea. Pursuant to Executive Order No. 10195,[1] that Asian country had been designated in 1950 as a "combat zone" for the purposes of certain provisions of the Internal Revenue Code of 1939.[2] Between the Korean conflict and the Vietnam war Colonel Hampton served in various noncombat military assignments. On November 3, 1967, he was assigned to duty with the 311th Air Command Squadron in the republic of Vietnam, which, since 1964 and pursuant to Executive Order No. 11216,[3] had been classified as a "combat zone" for the purposes of certain provisions of the Internal Revenue Code of 1954 (hereinafter "Code").[4]

On or about March 6, 1968, Colonel Hampton was killed in action.

Plaintiff and Colonel Hampton filed joint federal income tax returns for the years 1963 and 1964, reporting tax liabilities of $2,468.17 and $2,928.00, respectively. Relying upon § 692 of the Code, plaintiff filed claims with the Internal Revenue Service on January 2, 1960, for the refund of these amounts. The determination was made that plaintiff had not filed for the refund within the time prescribed by law, and her claims were therefore disallowed. On April 16, 1973, plaintiff submitted her petition to this court. The United States asserts, by way of defense, that the court lacks jurisdiction to entertain plaintiff's action because her claims for refund were not filed within the applicable period of limitations.[5]

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1 3 C.F.R. 1949—1953 Comp., p. 373.

2 *E.g.*, sections 22(b)(13), 154 and 3804(f) of the 1939 Code. 26 U.S.C. §§ 22(b)(13), 154, 3804(f) (1952 ed.).

3 C.F.R. 1964—1965 Comp., p. 301.

4 *E.g.*, sections 112, 692 and 7508 of the 1954 Code.

5 The United States grounds its defense on § 7422(a) of the Code, which provides:

§ 7422. Civil actions for refund.

"(a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

Section 692 of the Code — the basis for plaintiff's claimed entitlement — provides as follows:

> § 692. Income taxes on members of Armed Forces on death
>
> In the case of any individual who dies during an induction period (as defined in section 112 (c)(5)) while in active service as a member of the Armed Forces of the United States, if such death occurred while serving in a combat zone (as determined under section 112) or as a result of wounds, disease, or injury incurred while so serving —
>
> (1) any tax imposed by this subtitle shall not apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year ending on or after the first day he so served in a combat zone after June 24, 1950; and
>
> (2) any tax under this subtitle and under the corresponding provisions of prior revenue laws for taxable years preceding those specified in paragraph (1) which is unpaid at the date of his death (including interest, additions to the tax, and additional amounts) shall not be assessed, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment.

Paragraph (1) provides that a serviceman who dies while serving in a combat zone shall not be subject to income taxes for the year of his death, or for any prior taxable year ending on or after the first day he so served in a combat zone after June 24, 1950. The tax liability with respect to those years is cancelled. If taxes for the years ending on or after the date of first service in a combat zone have been paid, then a claim for refund of those taxes is cognizable under paragraph (1). It is under its ambit that plaintiff seeks repayment of the 1963 and 1964 amounts paid.

Paragraph (2) of section 692 authorizes additional tax relief in the case of a serviceman who dies while serving in a combat zone. It applies with respect to years preceding those specified in paragraph (1), that is, with respect to any years prior to first service in a combat zone. Any tax for those years which remains unpaid at the date of the serviceman's death shall not be assessed or collected; if such unpaid taxes are collected, they shall be credited or refunded as an overpayment. It will be

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observed that the tax forgiveness authorized by paragraph (2) has no bearing in this case because the 1963 and 1964 taxes here in question were not unpaid at the date of Colonel Hampton's death. *See Wallace* v. *United States*, 127 Ct. Cl. 701, 704, 119 F. Supp. 205, 206 (1954).

The disputed issue here is whether plaintiff's claims under § 692(1) for the refund of Colonel Hampton's 1963 and 1964 taxes were barred by § 6511(a) of the Code, the statute of limitations generally applicable to tax refund claims. Under § 6511(a) a taxpayer must file a claim for refund of an overpayment within 3 years from the time the return was filed or within 2 years from the time the tax was paid, whichever of such periods is the last to expire.[6] It is plaintiff's contention that § 692(1), by its terms, provides for the recovery of taxes with respect to *all* taxable years from the date of first service in a combat zone after June 24, 1950 through the date of death in the same or another combat zone. In the case of Colonel Hampton, this period embraces all calendar years from 1953 through 1968, though only calendar years 1963 and 1964 are involved in this action. Plaintiff maintains that the application of § 6511(a) limitations to defeat refund claims under § 692 would frustrate clearly expressed congressional intent and would be contrary to the benevolent purposes served by § 692. The specific arguments advanced by plaintiff in support of this reasoning will be discussed, *infra*. According to the Government's theory, Congress did not provide for automatic tax refunds under § 692 for all years prior to combat death starting with 1950. Rather, claims for refunds may be maintained only for those years open at the time of death under § 6511(a). the Government contends that the only relief from the § 6511 (a) period of limitations in the case of an individual dying in combat is that accorded by § 7508 of the Code, which generally provides

6 Section 6511(a) provides, in pertinent part, as follows:

"§ 6511. Limitations on credit or refund

"(a) Period of limitation of filing claim.—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid * * *."

servicemen in combat with an extension of time for performing various acts under the revenue laws, including the filing of returns, the payment of taxes, and the filing of a claim for a credit or refund of any tax.

For the reasons hereinafter discussed, we have concluded that plaintiff is not entitled to recover, and accordingly, the petition must be dismissed.

I

In construing these provisions of the income tax Code it is our duty to ascertain and effectuate the intent of Congress. Section 692 does not by its terms provide for a period of limitations different from that prescribed for refund claims generally under § 6511(a), nor are the refund claims authorized under § 692 expressly excepted from the application of § 6511(a) limitations. It is quite true that paragraph (1) of 692 authorizes relief from federal income taxes for any year on or after the first day a serviceman performed duty in a combat zone after June 24, 1950. But we read these terms of paragraph (1) only as establishing the outer limits of available relief under this special tax forgiveness provision. It is not our view that these terms expressly or impliedly manifest an intent on the part of Congress to dispense with the statute of limitations requiring tax refund claims to be filed within 3 years from the time the return was filed or within 2 years from the time the tax was paid. Absent some clear expression of legislative intent, it is not within our province to except refund claims filed pursuant to § 692 from the application of the general statute of limitations. *Cf. United States* v. *Zacks*, 375 U.S. 59 (1963).

There are clear indications in the legislative history to support the view that claims for refund brought under § 692 must be filed within the period of limitations provided by § 6511(a). The first relief statute similar to § 692 enacted during

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World War II — § 421 of the Internal Revenue Code of 1939[7] — authorized forgiveness from the income tax which would otherwise apply for the taxable year in which an individual died in active service as a member of the military. It also relieved the estate of such a serviceman from liability for taxes unpaid at the date of death. By the Act of August 5, 1947, 61 Stat. 778, Congress amended the World War II provision to broaden its relief.[8] In the case of an individual who died on or after December 7, 1941, and prior to January 1, 1948, while in the armed services, § 421, as amended, provided for cancellation of tax liability with respect to the taxable year in which falls the date of his death, and with respect to any prior taxable year ending on or after December 7, 1941, during any part of which he was a member of the armed forces. The amended version also retained the provision for forgiveness of income taxes which were unpaid at the date of death.

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7 Internal Revenue Code of 1939, 26 U.S.C. (1946 ed.) § 421, 57 Stat. 149. Section 421 provided:

"In the case of any individual who dies on or after December 7, 1941, while in active service as a member of the military or naval forces of the United States or of any of the other United Nations and prior to the termination of the present war as proclaimed by the President, the tax imposed by this chapter shall not apply with respect to the taxable year in which falls the date of his death, and the tax under this chapter and under the corresponding title of each prior revenue law for preceding taxable years which is unpaid at the date of his death (including interest, additions to the tax, and additional amounts) shall not be assessed, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment."

8 The amended version of § 421 (26 U.S.C.) (1946 ed., Supp. II), 61 Stat. 778, provided, in pertinent part, as follows:

"In the case of any individual who dies on or after December 7, 1941, while in active service as a member of the military or naval forces of the United States or of any of the other United Nations and prior to January 1, 1948—

"(a) the tax imposed by this chapter shall not apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year (ending on or after December 7, 1941) during any part of which he was a member of such forces; and

"(b) the tax under this chapter and under the corresponding title of each prior revenue law for taxable years preceding those specified in clause (a) which is unpaid at the date of his death (including interest, additions to the tax, and additional amounts) shall not be assessed, and if assessed the assessment shall be abated and if collected shall be credited or refunded as an overpayment."

In order to make this additional relief available to all servicemen who had died on or after December 7, 1941, or who were to die after the amendment and prior to January 1, 1948, Congress passed a special transitional period of limitations as section 2 of the Act of August 5, 1947 (61 Stat. 778). It provided as follows:

> Sec. 2. If at any time prior to January 1, 1948, the allowance of a credit or refund of an overpayment of the tax for any taxable year specified in section 421(a) of the Internal Revenue Code (as amended by this Act) is prevented (except for the provisions of section 3801) by the operation of any law or rule of law, a credit or refund of the overpayment of such tax to the extent that the overpayment is attributable to the change in law made by this Act may, nevertheless be allowed or made if a claim therefor is filed before January 1, 1949.

The House Report associated with this amendment clearly indicates that it was Congress' intention to provide relief from the otherwise applicable statute of limitations for filing refund claims. The Report stated as follows:

> Section 2 of the bill extends the time for filing a claim for credit or refund of an income tax paid by a member of the armed forces dying while in service with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year (ending on or after December 7, 1941) during any part of which he was a member of such forces. If the allowance of credit or refund of such an overpayment is barred prior to January 1, 1948 (*by the statute of limitations*, or any other law or rule of law), section 2 of the bill provides that credit or refund of the overpayment to the extent that the overpayment is attributable to the change in law made by the bill may be allowed or made if claim therefor is filed before January 1, 1949. [Emphasis added.] [H.R. Rep. No. 1006, 80th Cong., 1st Sess. 2.]

The practical effect of section 2 was to reopen the period of limitations regarding claims for credit or refund of overpayments for taxable years which were closed at the time this law was passed on August 5, 1947, and to hold such years open through December 31, 1948.

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When Congress reenacted this tax forgiveness measure at the beginning of the Korean war,[9] it dropped the special exception from the statute of limitations. There is no reference made to any conflict between the Korean war equivalent of § 692 and the statute of limitations provisions of § 6511(a), nor is there any indication of an intent to cause the period of limitations to be computed differently in the case of a refund of an overpayment under this section than in the case of refund claims generally. We are compelled to conclude in light of this legislative background that, absent an express measure excepting tax refund claims under § 692 from the operation of the general statute of limitations, the limitations period therein prescribed was intended to apply. *Cf. United States* v. *Zacks*, *supra*, at 64—67.

There is additional evidence in the legislative record of this statute which demonstrates that Congress considered claims under § 692 to be subject to the general statute of limitations. Section 692 was recently amended by Public Law No. 93—597, § 4 (January 2, 1975) with respect to years ending on or after the commencement of hostilities in Vietnam, February 28, 1961, to provide that relief under that section would not be lost due to a determination that a serviceman had died several years earlier but had mistakenly been classified as missing in action. Section 4(c) of the Act provided for a special exception to the operation of the statute of limitations, as follows:

> (c) REFUNDS AND CREDITS RESULTING FROM SECTION 692 OF CODE.—If the refund or credit of any overpayment for any taxable year ending on or after February 28, 1961, resulting from the application of section

9 It was the Korean war measure which first conditioned relief to service in a "combat zone." Section 154 of the 1939 Code (26 U.S.C.) (1952 ed.), 65 Stat. 452, provided:

"In the case of any individual who dies after June 24, 1950, and prior to January 1, 1954, while in active service as a member of the Armed Forces of the United States, if such death occurred while serving in a combat zone (as determined under section 22(b)(13)) or as a result of wounds, disease, or injury incurred while so serving—

"(a) the tax imposed by this chapter shall not apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year ending on or after the first day he so served in a combat zone after June 24, 1950; and

"(b) the tax under this chapter and under the corresponding title of each prior revenue law for taxable years preceding those specified in clause (a) which is unpaid at the date of his death (including interest, additions to the tax, and additional amounts) shall not be assessed, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment."

> 692 of the Internal Revenue Code of 1954 (as amended by subsection (a) of this section) is prevented at any time before the expiration of one year after the date of the enactment of this Act by the operation of any law or rule of law, but would not have been so prevented if claim for refund or credit therefor were made on the due date for the return for the taxable year of his death (or any later year), refund or credit of such overpayment may, nevertheless, be made or allowed if claim therefor is filed before the expiration of such one-year period.

It is obvious that such a provision would be unnecessary if Congress did not recognize the usual period of limitations to apply to refund claims under § 692.

II

Several arguments are pressed by plaintiff in support of her contention that the § 6511(a) period of limitations is not applicable in any respect to claims for recovery arising under § 692(1). Plaintiff first of all postulates that the terms of § 6511(a) and of § 692(1) are inconsistent and in conflict with each other. Reliance is placed upon the established canon of statutory construction that where general provisions, terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provisions must control. It is plaintiff's argument that the broader, more general language of the statute of limitations must yield to the specific terms of § 692(1) providing for refund of taxes for years as early as 1950. In the first place, there is no conflict or inconsistency inherent in the terms of these two sections of the Code: the time period embodied in § 692(1) merely defines the extent of scope of claims authorized under that section, whereas the statute of limitations, by its nature, limits the time period for the *enforcement* of such a claim. Additionally, while we do not gainsay the importance of rules of statutory construction, the limited scope of such "rules" must be kept in mind. They are useful only insofar as they give guidance to courts in discovering the legislature's intent. But where the legislative intent is otherwise manifest, resort to general maxims or principles of statutory construction is of dubious value. Here, as discussed *supra*, the legislative record makes clear that Congress did not intend to exclude refund claims under § 692 from the operation of the general statute of

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limitations. The rule of construction urged by plaintiff—adherence to which would produce a result plainly at variance with the expressed legislative intent—must be rejected.

Plaintiff next directs our attention to the fact that § 692 is physically arranged in two separate paragraphs, each of which provides a different and distinct form of tax relief. At the end of paragraph (2), which authorizes forgiveness of any tax unpaid at the time of a serviceman's death, it is provided that any such unpaid taxes which are subsequently paid shall be credited or "refunded as an overpayment." It is conceded by plaintiff that this language, *as to claims for relief under paragraph* (2), invokes the general statute of limitations in § 6511(a), which governs limitations for claims "for credit or refund of an overpayment." However, plaintiff objects to the Government's reliance on this language of paragraph (2) to invoke the general statute of limitations against claims for refund arising under paragraph (1). It is plaintiff's contention that these terms of paragraph (2) in no way operate to circumscribe the remedies available to enforce the "absolute right" (plaintiff's words) to recover taxes under paragraph (1).

It appears that plaintiff is correct in the assertion that the "refund of an overpayment" language of paragraph (2) applies only with respect to claims for relief under that paragraph, and not with respect to claims arising under paragraph (1).[10] It is also true, as the plaintiff points out, that paragraph (1) has no language similar to that in paragraph (2) providing that taxes which have been paid shall be "refunded as an overpayment." But in our view there is a logical reason for the omission. As will appear from an analysis of the total legislative plan providing relief from the revenue laws of servicemen in combat, to be discussed *infra*, it is generally assumed that taxes for the years for which paragraph (1) provides forgiveness would not be paid in the first place and, accordingly, that refunds for those taxes would not be required. In any event, when taxes for years covered by paragraph (1) *are in fact paid*, it is clear from the legislative history of § 692 that Congress intended the taxpayer's estate to recover those taxes by filing a claim for the "refund of an overpayment." The special transitional period of limitations established by the 1947 amendment to the World

10 This conclusion is supported by the language and structure of § 692. *See Wallace* v. *United States*, 127 Ct. Cl. 701, 704, 119 F. Supp. 205, 206 (1954), wherein the court stated: "The language at the end of * * * paragraph [2] about crediting or refunding taxes unpaid at the date of death must have to do with cases where information as to the death of the soldier was delayed, or where, in ignorance of the law, the taxes were paid after his death."

War II version of § 692 provided for "the allowance of a credit or *refund of an overpayment of the tax for any taxable year specified in section 421(a)* [the equivalent of paragraph (1) of § 692]." [Emphasis added.] We are compelled to reject plaintiff's contention that claims for the refund of taxes paid for years covered by paragraph (1) of § 692 are not required to be filed as claims for the "refund of an overpayment." [11]

Plaintiff's argument that refunds under § 692(1) are governed by the 6-year period of limitations prescribed in 28 U.S.C. § 2401, the general statute of limitations for civil actions against the United States, is based upon the incorrect assumption that the filing of a claim for the "refund of an overpayment" is not required under § 692(1). Moreover, the filing of a claim for refund or credit with the Secretary of the Treasury is a condition precedent to the maintenance of any suit for the recovery of any wrongfully assessed tax, penalty or "of *any sum* alleged to have been excessive or *in any manner* wrongfully collected." [Emphasis added.] Int. Rev. Code of 1954, § 7422(a).[12] We have no doubt that the all inclusive "any sum" and "in any manner" language embraces taxes sought to be recovered under § 692(1). Plaintiff's argument for avoidance of the requirement of filing a refund claim with the Secretary—thereby to avoid the shorter periods of limitations imposed on the filing of refund claims by § 6511(a)—disregards the legislative plan for seeking the recovery of income taxes as well as its underlying policy considerations. *See J. O. Johnson, Inc.* v. *United States*, 201 Ct. Cl. 315, 321-23, 476 F.2d 1337, 1340-41, *cert. denied*, 414 U.S. 857 (1973). No authority is cited by plaintiff for the proposition that Congress intended § 692(1) to constitute statutory authority for suits against the United States outside the scope of that provided in the Internal Revenue Code. We have no warrant to deviate from the general Code pattern providing for the recovery of taxes without some clear reason or indication of legislative intent that refund claims under § 692(1) should be accorded the special treatment demanded by plaintiff. The only case cited by plaintiff in support of her theory that refunds under § 692(1) are governed by the general 6-year statute of limitations is *Hoon Kwan Young* v. *United States*, 110 F. Supp. 237 (D.Hawaii 1953).

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11 The Treasury Regulations also provide that if taxes for years covered by § 692(1) are collected the amount so collected "shall be credited or refunded as an overpayment." Treas. Reg. § 1.692(a)(1) And *see* Rev. Rul. 69-301, 1969-1 CUM. BULL. 183.

12 *See* note 5, *supra*.

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That decision is not in point since it was expressly grounded on the doctrine of account stated, a doctrine which sounds in contract and thereby allows recovery under the general 6-year statute of limitations. *See Bonwit Teller & Co.* v. *United States*, 283 U.S. 258, 265 (1931).

Plaintiff next asserts that § 6511(a) cannot control here because that section is applicable only to taxes in respect of which the taxpayer is required to file a return, and that Colonel Hampton was not required to file a return for the 1963 and 1964 taxes since § 692(1) cancels his liability for those taxes. The first problem with this argument is its narrow and strict interpretation as to the scope of § 6511(a). In *Alexander Proudfoot Co.* v. *United States*, 197 Ct. Cl. 219, 454 F. 2d 1379 (1972), and again in *J. O. Johnson, Inc.* v. *United States, supra*, this court refused to accept a restricted interpretation of § 6511(a) which would limit its application to taxes for which a return is required. Those cases concerned the taxpayers' claims for the recovery of sums paid in satisfaction of an accumulated earnings tax. It was argued that since an accumulated earnings tax is not the type of tax which is reported on a return—because it is not self-assessing in nature—the period of limitation was inapplicable. In rejecting this argument the court in *Alexander Proudfoot* stated:

> * * * § 6511(a) was obviously intended to cover all taxes, whether or not a return is required, and its wording can easily carry that understanding since it expressly provides for the case where "no return was filed by the taxpayer." [197 Ct. Cl. at 225, n. 7, 454 F. 2d at 1382, n. 7; *accord, J. O. Johnson, Inc., supra*, 201 Ct. Cl. at 320, 476 F. 2d at 1340.]

This conclusion was shown to be supported by congressional intent, as manifested in the general legislative scheme of § 6511(a) and related sections of the tax code. *See J. O. Johnson, supra*, 201 Ct. Cl. at 320-23, 476 F. 2d at 1340-41.

In any event, plaintiff is incorrect in her assertion that Colonel Hampton was not required to file income tax returns for the years 1963 and 1964. The terms of § 692, which cancel liability for the "tax imposed," do not relieve taxpayers of the obligation of filing tax returns otherwise required under § 6012 of the Code (26 U.S.C.). Not only was Colonel Hampton required to file tax returns for the years 1963 and 1964, but returns for those years were, in fact, timely filed.

III

Having decided that claims for a tax refund pursuant to § 692(1) are not invulnerable to the defense of limitations, we turn to the question whether the statute of limitations operates to bar the refund claims involved in the instant case. The pertinent terms of § 6511(a) require that a claim for refund of taxes be filed within 3 years from the filing of the tax return. As mentioned earlier, Colonel Hampton's tax returns for 1963 and 1964 were filed on April 15, 1964 and April 15, 1965, respectively. As to the recovery of the 1963 taxes, the period of limitations expired on April 15, 1967. Thus, the period of limitations elapsed prior to Colonel Hampton's assignment to Vietnam, and prior to his combat death. According to the Government's theory, the operation of the statute of limitations closed the door so that the recovery of the 1963 taxes was never possible. As to the recovery of the 1964 taxes, the 3-year period of limitations would normally have expired on April 15, 1968. However, Colonel Hampton was assigned to active duty in Vietnam on November 3, 1967, and the Government maintains that the running of the statute of limitations was suspended during his service in that combat zone by virtue of § 7508 of the Code (26 U.S.C.). That section postpones the time for performing certain acts under the revenue laws—including the time for filing a claim for credit or refund of any tax—during the period of service in a combat zone, plus the period of continuous hospitalization outside the United States attributable to injury in a combat zone, plus the next 180 days thereafter. The Government asserts that when an individual dies in combat § 7508 was intended by Congress to apply and to provide his estate with relief from the statute of limitations. This view is supported by the House Report associated with the enactment of § 3804(f) of the 1939 Code, the statutory predecessor of § 7508. The House Report states:

> * * * In the case of an individual who dies while serving in a combat zone, or while hospitalized outside the States of the Union and the District of Columbia as a result of injury received in a combat zone, the next 180 days after his death would be disregarded under section 3804 in determining whether acts have been timely performed by his executor, administrator, or conservator. [H.R. Rep. No. 3200, 81st Cong., 2d Sess. 2.]

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The Government points out that the period of limitations for filing a claim with respect to the 1964 taxes had approximately 5½ months to run at the time of Colonel Hampton's assignment to Vietnam. Thus, under the Government's analysis, the period of limitations was suspended by § 7508 during the period of the taxpayer's service in Vietnam (November 3, 1967 to March 6, 1968), plus 180 days thereafter (March 7, 1968 to September 2, 1968) and it expired 5½ months later, on or about February 15, 1969. The Government says that plaintiff's claim for refund of the 1964 taxes would have been timely if it has been filed on or before February 15, 1969.

Plaintiff forcefully urges that the Government's analysis of the relationship between § 6511(a) and § 692(1) produces a result which is harsh, unreasonable and patently absurd. The crux of plaintiff's argument is that § 6511(a) assumes that a claim for a tax refund arises upon the due date for filing the return (or alternatively, upon the date of actual payment), and that when its terms are applied to limit the period for the enforcement of a claim under § 692(1), which contemplates the date of the serviceman's death as the event giving rise to the claim for a tax refund, then an unintended injustice manifestly results. Plaintiff points out that the operation of these sections results in the expiration of the period of limitations—at least with respect to the refund claim for the 1963 taxes—prior to the time the claim under § 692(1) arises. Numerous authorities are relied upon for the proposition that a period limited by law for the enforcement of a claim cannot begin to run until such time as the claim or cause of action to which it relates arises. Plaintiff also invokes the principle that statutes must be construed to avoid absurd and whimsical results. It is submitted that refund claims for 1963 and 1964, having been filed within 3 years from the date of Colonel Hampton's death, were timely filed and not barred by the operation of § 6511(a).

The Government is technically correct in its conclusion that plaintiff's refund claims under § 692(1) are barred by the operation of § 6511(a) limitations. We do not hesitate to so hold. We would be inclined to agree with plaintiff's argument that the joint construction of § 692(1) and the statute of limitations produces an anomolous result if, in fact, plaintiff were correct in her contention that the death of Colonel Hampton gave rise to a claim for the refund of his 1963 and 1964 taxes. The principal flaw in plaintiff's reasoning is that it begs the ultimate question by assuming that the recovery of Colonel Hampton's 1963 and 1964 taxes is warranted under the

provisions of § 692(1). We have concluded that the terms of § 692(1) do not authorize the refund of taxes for those years. When the relief accorded by § 692(1) is confined to its intended and limited scope, the interrelationship between that section of the Code and the statute of limitation produces no harsh, unjust or absurd results.

Section 692(1) expressly provides that any tax shall not apply with respect to the taxable year of a serviceman's death, "* * * or with respect to any prior taxable year ending on or after the first day he so served in a combat zone after June 24, 1950 * * *." The extent of the relief provided is circumscribed by two events: one is the date of first service in a combat zone after June 24, 1950; the other is combat death. Drawing from the literal import of the language, plaintiff maintains that tax liability is cancelled for all years between these two events, whether or not their occurence is in the same combat zone, and whether or not there are intervening years of noncombat service. This interpretation would allow recovery of the taxes for 1963 and 1964, 2 years of noncombat service in the span of time between Colonel Hampton's tour of combat duty in Korea and his tour of combat duty in Vietnam.

We interpret the statute differently. It is our view that Congress intended paragraph (1) of § 692 to cancel tax liability for *years of actual, continuous combat service* from the time a serviceman first entered the combat zone until his subsequent death therein. Since paragraph (1) relates solely to years in combat service, then paragraph (2)—which refers to "* * * taxable years preceding those specified in paragraph (1) * * *"—must accordingly relate to all years prior to the date in which a serviceman entered combat.

Section 692(1) and (2) should be construed together with the other related provisions of the Code which afford special tax treatment to members of the Armed Forces serving in combat. A brief description of the statutory framework will facilitate our analysis of the intended scope of relief under § 692(1), and it will demonstrate that the interpretation we have given to that section is in harmony with the legislative scheme. Under § 112 of the Code an exclusion from gross income is provided for pay received for active service by a member of the armed forces for any month during which he either served in a combat zone or was hospitalized as a result of wounds, disease, or injury incurred while serving in a combat zone. This is referred to as "combat pay." (In the case of enlisted personnel the exclusion applies to all of their pay; in the case of commissioned officers,

the exclusion applies to the first $500 per month of their pay.) Additjonally, under § 3401(a)(1) of the Code, such combat pay is not subject to withholding.

A Serviceman in combat is also given an automatic extension of time to perform certain acts under the revenue laws by virtue of § 7508 of the Code. He may disregard the period of service in a combat zone plus any period of hospitalization abroad as a result of injuries incured in such service, plus the next 180 days. The postponement authorized under § 7508 generally applies to the filing of returns, the payment of any tax, the assessment of any tax, and the commencement of any suit. As mentioned earlier, these deferment rules expressly authorize relief from the period of limitations for filing a claim for credit or refund of any tax. 26 U.S.C. § 7508(a)(1)(E). Moreover, in the case of an individual who dies while serving in a combat zone, or while hospitalized abroad as a result of injury received in a combat zone, the next 180 days after his death would be disregarded under § 7508 in determining whether acts have been timely performed by his executor, administrator or conservator.

The total legislative scheme of § 692 and these other related provisions is geared to accommodate the extigencies of war. The terms of paragraph (1) of § 692 clearly appear to contemplate that a serviceman's pay has not been included in gross income, that his combat pay was not subject to withholding, that the serviceman did not file any tax return, and that he did not in fact pay any taxes. Thus, the language of paragraph (1)—that "any tax under this subtitle *shall not apply* * * *" [emphasis added]—was not inadvertently chosen; it was obviously intended to be applicable with respect to years for which there was no obligation to file any returns or pay any tax. Since the tax "shall not apply" the estate of the deceased serviceman is thus relieved under paragraph (1) of the obligation of paying taxes for the years of combat service. By comparison, the language of paragraph (2) of § 692 provides that *"any tax * * * which is unpaid at the date of his death (including interest, additions to the tax, and additional amounts) shall not be assessed * * *."* [Emphasis added.] These terms assume that the serviceman has an outstanding tax liability which remains unpaid at the date of his death. Since there is no outstanding tax liability for the years of continuous service in a combat zone from the date of first entry until subsequent death therein, paragraph (2) must refer solely to years prior to such combat service. The tax forgiveness of paragraph (2) frees the estate and family of the dead serviceman

of the burden of raising funds to satisfy the serviceman's unpaid tax debts.

There are no "refund" provisions included in paragraph (1) (as there are in paragraph (2)), and this is further evidence that paragraph (1) applies strictly to years in combat service. The reason for the omission is, once again, that it was generally assumed that a serviceman in combat would not file returns and pay any tax during combat service; rather it is was assumed that he would take advantage of the deferment rules of § 7508. It is clear, nevertheless, that if a serviceman was overly diligent and paid his taxes during years in combat, his estate could recover those taxes pursuant to paragraph (1) by filing a claim for the refund of an overpayment (*see* discussion, *supra*).

There is no harshness or absurdity resulting from the joint operation of § 692 (as we have construed its provisions) and the § 6511(a) statute of limitations. Under § 6511(a) the filing of a return (or the payment of a tax) normally commences the running of the period of limitations for refund claims. However, § 7508(a)(1)(E) defers the running of limitations as to refund claims during the period that a serviceman is in combat service, and for the next 180 days. Accordingly, 180 days after combat death the statute of limitations commences to run and the deceased serviceman's estate has 3 years from that time to file a claim for the refund of taxes paid during years of combat service.

There is nothing in the legislative history of § 692(1) to suggest that Congress intended it to provide tax relief for years of noncombat service which intervene two tours of combat duty in different combat zones. On the contrary, such indications as there are show that relief was to be limited to years of actual combat service from the date of first entry into a combat zone until subsequent death therein. The World War II measure for the abatement of income taxes upon the death of a member of the armed services, § 421 of the 1939 Code, applied in the case of an individual who died on or after December 7, 1941 and "* * * prior to the termination of the present war * * *." When that provision was amended by the Act of August 5, 1947 (61 Stat. 778) to broaden its relief,[14] the new provision applied in the case of an individual who died "* * * on or after December 7, 1941 * * * and prior to January 1, 1948 * * *." The carefully circumscribed terms of both versions of § 421 of the

13 *See* note 7, *supra*.
14 *See* note 8, *supra*.

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1939 Code make clear that they were meant to apply in the case of deaths occurring during service in World War II. Between 1948 and 1950 this country was not engaged in any war and, accordingly, there was no tax relief measures similar to § 692 then in force. The Korean war version, § 154 of the 1939 Code,[15] applied in the case of an individual who died in combat "* * * after June 24, 1950, and prior to January 1, 1954 * * *." United States and United Nations forces were still engaged in the Korean conflict on January 1, 1954, and, accordingly, by the Technical Changes Act of 1953 (67 Stat. 615) Congress extended the terms of the tax relief measure for another year by striking out "January 1, 1954" and inserting "January 1, 1955." The terms of § 154 were clearly drawn to apply only with respect to years of combat service in the Korean war.

When § 692 came into being at the time of the enactment of the Internal Revenue Code of 1954, the Korean conflict had not yet come to an end.[16] The terms of § 692 were written to apply to combat deaths after June 24, 1950. No expiration date was included within the terms of § 692, evidently either because there was uncertainty as to when hostilities in Korea would terminate, and Congress wanted to avoid technical amendments extending the terms of § 692 in the future, or, as is more likely the case, it was felt that the inclusion of a specific expiration date in the statute was somewhat superfluous since the terms of § 692 became operative and inoperative by Executive Order. There was no need to enact special legislation or to amend § 692 to provide relief to the estates of servicemen killed in Vietnam; the terms of the statute became operative upon the President's designation of Vietnam as a "combat zone."[17]

As previously mentioned, the recent amendment of § 692 by Public Law 93-597 holds open the period of limitations so that relief under that section would not be lost due to a determination that a serviceman had died at an earlier time but had been mistakenly classified as missing in action. Prior to the amendment taxes were forgiven only through the year of the serviceman's *actual* death; the amendment extends the forgiveness to cover the years a serviceman is in missing status

15 *See* note 9, *supra.*

16 It was not until January 31, 1955, that Korea lost its "combat zone" status for the purposes of the relevant sections of the Internal Revenue Code. Exec. Order No. 10585, 3 C.F.R., 1954-1958 Comp., p. 235.

17 The date designated for the commencement of combatant activities in Vietnam was January 1, 1964. Exec. Order No. 11216, 3 C.F.R., 1964-1965 Comp., p. 301.

following his actual death. It is important to note that the limitations period is held open as to refund claims "* * * for any taxable year ending on or after February 28, 1961 * * *." Thus, the estates of those missing in action in Vietnam (and later determined to have died at an earlier time) can only claim refunds under § 692 for years subsequent to the commencement of hostilities in Vietnam. This is persuasive support for the view that Congress did not intend the estates of those dying in Vietnam to recover income taxes, pursuant to § 692(1), for taxable years prior to years of service in that combat zone.

In summary, Congress enacted § 692 to alleviate some of the hardships borne by survivors of servicemen dying as a result of service in a combat zone. Under paragraph (1) of that provision tax liability is cancelled for years of actual, continuous combat service from the time a serviceman first entered the combat zone until his subsequent death therein. Under paragraph (2) any taxes for prior years which remain unpaid at the serviceman's death are forgiven. We are unable to construe § 692 as liberally as plaintiff would like. To allow plaintiff to recover taxes for years of noncombat service (1963 and 1964), prior to Colonel Hampton's combat zone assignment to Vietnam in 1967, would provide plaintiff with a windfall and would stretch the relief afforded by § 692 beyond its intended bounds.

For the reasons stated above, we hold that plaintiff's tax refund claims were technically barred by the statute of limitations. But even if plaintiff were able to cross the barrier of limitations, her claim for the refund of Colonel Hampton's 1963 and 1964 income taxes would have to be disallowed on the merits. Accordingly, the plaintiff's motion for summary judgment is denied and the defendant's cross-motion for summary judgment is granted. The petition is dismissed.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1584

ANNE H. HAMPTON, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF FREDERICK JORDAN HAMPTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question presented by the petition is whether claims for refund of income taxes filed by petitioner, seeking to invoke the special tax relief under Section 692 of the Internal Revenue Code of 1954 for servicemen killed in a combat zone, were barred by the statute of limitations of Section 6511(a) of the Code.

The pertinent facts are as follows: Petitioner is the widow of Colonel Frederick Hampton, and the executrix of his estate. Colonel Hampton was a career Air Force officer who was killed in action in Vietnam. From April 1953 to October of that year, Colonel Hampton was assigned to active military duty in Korea, a designated combat zone. From October 1953 until November of 1967, he was assigned to various noncombat duties. On November 3, 1967, Colonel Hampton was again assigned to active combat duty in Vietnam, which had been classified a combat zone in 1964. He was killed in action on or about March 6, 1968 (Pet. App. A2).

Petitioner and Colonel Hampton filed joint federal income tax returns for 1963 and 1964 on April 15, 1964 and April 15, 1965, respectively, reporting tax liabilities of $2,468.17 and $2,928.00. The full amount of these liabilities was timely paid. On January 2, 1970, petitioner filed claims for refund of the taxes paid for 1963 and 1964 asserting that the tax liabilities for those years had been cancelled by Section 692 of the Code. The Internal Revenue Service disallowed the claims for refund as barred by the statute of limitations of Section 6511(a) of the Code. In this ensuing refund suit, the Court of Claims upheld the government's defense under the statute of limitations, and alternatively held that petitioner was not eligible for relief under Section 692 (Pet. App. A1-A19).

1. Section 6511(a) of the Code provides that a claim for refund of an overpayment of tax must be filed within three years from the date the return was filed or two years from the time the tax was paid, whichever period expires later. It is undisputed that the claims for refund at issue were not filed within the limitations period prescribed by that statute. Nevertheless, petitioner argues (Pet. 5-7) that because of the special nature of the relief accorded by Section 692 to servicemen killed in a combat zone, Congress could not have intended that that relief would be subject to the general statute of limitations provisions. Her position, however, is not only unsupported by any authority but is, as demonstrated by the Court of Claims (Pet. App. A5-A9), refuted by the legislative history of Section 692.

Section 692(1) provides that a serviceman who dies while serving in a combat zone shall not be subject to income taxes for the year of his death, or for any prior taxable year ending on or after the first day he so served in a combat zone after June 24, 1950. Although the effect of the statute is to cancel the serviceman's tax liability for those years, the statute by its terms does not authorize an automatic refund of taxes. Rather, if a deceased serviceman pre-

viously has paid taxes for any years covered by Section 692, the amounts so paid are treated as an overpayment. Treasury Regulations on Income Tax, Section 1.692-1(26 C.F.R.). Consequently, under the statutory scheme of the Code, no refund of such overpayment may be made by the Treasury or ordered by the courts unless a timely claim for refund is filed. See Secs. 6511(b)(1), 6532 and 7422(a) of the Code.

Contrary to petitioner's argument (Pet. 8), the fact that Section 692 authorizes relief with respect to taxable years as early as 1950 does not indicate that Congress intended to waive the limitations period in Section 6511. See *United States* v. *Zacks*, 375 U.S. 59. The legislative history of Section 692, and its predecessor provisions, shows that Congress was aware that the relief might be precluded in certain circumstances by the applicable statute of limitations.

In the Act of August 5, 1947, 61 Stat. 778, Congress amended the World War II predecessor of Section 692 (Section 421 of the Internal Revenue Code of 1939) to broaden its relief. As amended, Section 421 provided for the cancellation of tax liability in the case of a serviceman's death for all years after December 7, 1941, during which he was a member of the Armed Forces. Congress recognized that the statute of limitations might bar the retroactive relief otherwise authorized by the amended version of Section 421. It therefore enacted a special transitional period of limitations as Section 2 of the Act of August 5, 1947, in order to avoid that possibility. See H.R. Rep. No. 1006, 80th Cong., 1st Sess., p. 2 (1947).

However, when this tax forgiveness provision was reenacted at the beginning of the Korean War (Section 154 of the 1939 Code), Congress eliminated the special exception from the statute of limitations. And in reenacting Sec-

tion 154 as Section 692 of the 1954 Code, Congress provided no special limitations period. It thereby indicated that it intended the normal period of limitations to apply to claims under Section 692. Thus, there is no basis for disregarding the effect of the applicable statutes of limitations. *United States* v. *Zacks, supra.*

Finally, the recent amendment made to Section 692 by Section 4 of the Act of January 2, 1975, Pub.L. 93-597, 88 Stat. 1950, confirms that claims for refund predicated on Section 692 are subject to the limitations imposed by Section 6511. Section 4(c) of the Act, which is applicable to years ending on or after February 28, 1961, provides a special exception to the limitations period for filing claims for refund to make certain that relief authorized under Section 692 will not be lost as the result of a determination that a serviceman had died several years earlier but had been mistakenly classified as missing in action. As the Court of Claims noted below (Pet. App. A9), this provision would have been unnecessary if Congress did not consider the normal period of limitations to be applicable to refund claims under Section 692.[1]

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[1]There is no authority for petitioner's claim (Pet. 5-7) that the period of limitations should be construed as running from the date of the serviceman's death. The applicable statute of limitations under Section 6511 provides that the period begins to run from the time the return is filed or the tax is paid.

Petitioner alternatively contends (Pet. 7) that a refund of taxes under Section 692 is not subject at all to the restrictions imposed by Section 6511 but instead is governed by the six-year period of limitations provided in 28 U.S.C. 2401, the general statute of limitations for instituting civil actions against the United States. But Section 7422(a) of the Internal Revenue Code of 1954 prohibits the maintenance of any suit for the recovery of "*any sum* alleged to have been excessive or in *any manner* wrongfully collected" (emphasis supplied), unless a claim for refund has been duly filed. The doctrine of account stated, upon which petitioner relies, has no application to a suit for the recovery of taxes.

2. At all events, even if petitioner's claims for refund had been timely filed, she could not prevail in this action. As the Court of Claims observed, nothing in the legislative history of Section 692 indicates that Congress intended to extend the relief to years of noncombat service which intervene between separate years of combat duty. Here, it is undisputed that Colonel Hampton was engaged in noncombat service during the years in question. As the Court of Claims concluded, the legislative scheme reflected in Section 692 and the related provisions dealing with members of the Armed Forces, demonstrate that the statute was intended to cancel tax liability only for years of actual, continuous combat service. Thus, petitioner's claim does not qualify for the benefits accorded by Section 692.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.